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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. [redacted] 12

Sarpas Lee Neely, by her legal representative and guardian, Cecile V. Neely,
Petitioner,
vs.
Martin K. Eby Construction Co., Inc.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[redacted]

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OCTOBER TERM, 1965

No. 383

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,
Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANSWER BRIEF FOR THE RESPONDENT

I. OPINIONS BELOW

These are adequately covered in the Brief of Petitioner.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief of Petitioner.

III. QUESTIONS PRESENTED

A. Whether the Court of Appeals has the power to reverse for insufficiency of evidence and remand to the District Court for dismissal a tort action in which the plaintiff obtained a judgment based upon a jury verdict, the provisions of Rule 50, Federal Rules of Civil Procedure to the contrary notwithstanding.

B. Whether the Court of Appeals, after deciding that respondent should have been granted a judgment n.o.v., had power under Rule 50 of the Federal Rules of Civil Procedure and this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Globe Liquor Co. v. San Roman*, 332 U.S. 571; and *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, to order the case dismissed and thereby deprive petitioner of any opportunity to invoke the trial court's discretion on the issue of whether petitioner should have a new trial?

C. Whether the Court of Appeals erred in ordering the District Court not merely to enter a judgment n.o.v. for respondent but to dismiss plaintiff's case in view of Rule 50 (c) (2) of the Federal Rules of Civil Procedure which gives a party whose verdict has been set aside the right to make a motion for new trial not later than 10 days after entry of the judgment notwithstanding the verdict?

D. Whether Rule 38 (a) of the Federal Rules of Civil Procedure and the Seventh Amendment of the Constitution of the United States preclude the Court of Appeals from instructing the trial court to dismiss an action wherein the plaintiff obtained a jury verdict in the Dis-

trict Court and the District Court thereafter denied defendant's Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and entered judgment for plaintiff?

E. Whether the Court of Appeals correctly held that plaintiff failed to establish either the negligence of the defendant or the proximate cause of the accident which resulted in the death of plaintiff's decedent?

IV. CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND FEDERAL RULES INVOLVED

The pertinent provisions of Rule 38 and Rule 50 of the Federal Rules of Civil Procedure, as well as the pertinent provisions of the Seventh Amendment to the Constitution of the United States are adequately set forth in the Brief of Petitioner at pp. 3, 4 and 5.

The pertinent provisions of the Judicial Code of 1948 (62 Stat. 963, 28 U.S.C. 2106) provide as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646. 62 Stat. 963.

V. STATEMENT

So as to clarify certain portions of petitioner's brief —especially the many omissions which appear in her Statement—we submit the following statement as to the facts material to the consideration of the questions presented in Petitioner's brief.

A. THE PLEADINGS

This is an action in tort for the alleged wrongful death of Gary Lee Neely, deceased. In her amended complaint, petitioner (minor daughter of decedent) alleged that her father was killed in an accident which occurred in a missile silo under construction southeast of Denver, Colorado; and further that her father's death was proximately caused by the negligence of respondent in the erection, maintenance and supervision of a certain scaffold located in the silo. (R. 2-3). In its answer respondent admitted the time and place of the accident and death, but denied the remaining material allegations of the amended complaint (R. 4-5). Jurisdiction of the trial court was based upon diversity of citizenship and an amount in controversy in excess of $10,000.00. The case was tried to a jury in United States District Court for the District of Colorado. At the close of petitioner's case, respondent moved for a directed verdict, the principal ground being that of legal insufficiency of the evidence to prove a case. (R. 71). This motion was denied (R. 73). At the close of all the evidence, respondent again moved for a directed verdict and the same was denied (R. 80). The jury then returned a verdict in favor of petitioner for $25,000.00 (R. 87) upon which judgment was forthwith entered (R. 6). The next day, respondent filed its motion for judgment notwithstanding the verdict

or for new trial, asking among other things that the verdict of the jury be set aside and that judgment be entered in favor of respondent in accordance with its previous motions for directed verdict (R. 6-8). No motions attacking the judgment or for any other relief were filed by petitioner. Respondent's motion just mentioned was denied by the District Court (R. 8). Respondent thereafter appealed to the Court of Appeals for the Tenth Circuit which court by writtten opinion reversed the judgment of the trial court and remanded the cause to the trial court with instructions to dismiss (R. 88-95). The mandate of the Court of Appeals was thereafter carried out. Petitioner then applied for writ of certiorari, which was granted by this Court.

At no time during the pendency of the action in the Court of Appeals—or at any time thereafter—did petitioner by brief, motion or otherwise assert any grounds which would entitle her to a new trial should the Court of Appeals reverse. The only request made of the Court of Appeals by petitioner in her brief there was that the judgment of the trial court be affirmed (Page 16 of Petioner's brief in Court of Appeals).

B. THE EVIDENCE

In her statement filed with this Court, petitioner makes no reference to the evidence adduced in the trial court; however, since she thereafter refers to said evidence in her Argument, we feel that a brief summary of the evidence is necessary here.

The silo where the accident occurred was being constructed and equipped by several different contractors,

and when completed was designed to house underground a Titan missile together with an elevator or launcher by means of which the missile could be raised from its underground position for firing. The movements of the launcher were controlled and stabilized by counterweights which went down as the launcher rose and vice versa. The silo was a cylindrical concrete structure 50 feet in diameter and 130-140 feet deep (R. 30). For construction purposes, the silo was divided into four quadrants, to-wit: Quadrant I the southeast quarter; Quadrant II the northeast quarter; Quadrant III the northwest quarter and Quadrant IV the southwest quarter (R. 24). Located within the silo was a steel framework, called a crib, in which the launcher was able to ride up and down (R. 24). Outside the crib were the two counterweights, which rode on a system of rigid rails (R. 24). The counterweights were of a rather odd shape, so as to fit between the square framework of the crib and the round outside wall of the silo (Exhibit 10). One counterweight was located in Quadrant II and another in Quadrant III.

Scaffolding and platforms required during the course of construction were furnished and built by respondent as subcontractor on the project. Neely's employer was also a subcontractor on the project, its contract providing that it would furnish engineering services. Still another subcontractor provided the millwrights and other crafts working in the area. As of the day of the accident, the silo itself was practically complete, but the missile was yet to be installed. Both the launcher and the counterweights had been installed, but had yet to be tested operationally.

On the morning of the day of the accident, the

launcher was run for the first time on its own power, and at about noon on said date the engineering services company by whom Neely was employed as night silo captain was given exclusive occupancy of the silo for the purpose of performing certain tests (R. 13). One of the tests required certain measurements to be taken from a drive locking mechanism at the bottom of the silo and the counterweight locking mechanism located about 6 feet below the top of the silo (R. 15). Because certain scaffolding previously erected for other purposes in the silo by respondent interfered with the test measurements, the day silo captain Fred P. Blanchard decided that the platform would have to be modified (R. 15) and directed respondent's carpenter foreman to make the necessary changes (R. 16; 33-34). The platform to be modified was about 2 feet above the counterweights, and after the changes had been made did not cover the entire space between the counterweights.

Blanchard denied being present while the modifications were being made (R. 36) but in this he was contradicted by respondent's foreman Imel (R. 75). When the modifications were complete Blanchard told the millwrights they could begin making the critical measurements (R. 16) at which time respondent's carpenters were either gone or getting ready to leave (R. 37). Before leaving the area, Blanchard observed Neely standing on the platform with a notebook on the rail, talking to the millwrights. He asked Neely how things were going, to which Neely replied that "everything is under control" (R. 16) whereupon Blanchard left the area, not to return until after the accident. Before leaving, Blanchard observed that the platform was on the level requested, (R. 36), that the area was well lighted and that he could

see the counterweights and the platform as well as the gaps between them (R. 40).

The platform in question—a temporary structure—was located both before and after the accident in the same place (R. 34). It extended in a north-south direction from the crib to the outside edge of the silo and was supported at the inside end by I-beams and on the outside end by pipes, both of which formed permanent parts of the installation (R. 45-46). On traversing this distance, the platform went between the two counterweights in such a manner that the Quadrant III counterweight was west of the platform and the Quadrant II counterweight was east of the platform. The platform was not more than two feet above the counterweights on a vertical plane, and it was one or two feet away from each counterweight on a horizontal plane (R. 37). These distances were further illustrated by Exhibits 1, 2 and 3 attached to petitioner's brief and which were admitted into evidence as being accurate representations of the scene at the time the accident occurred (R. 18). There was a railing on the plaform that commenced about 3 feet from the crib and ran along the Quadrant II or east side of the platform, and continued along the end next to the outer wall. There was no railing along the Quadrant III or west side of the platform (R. 46-47).

In addition to Neely, there were three other men engaged in making the measurements—McCoun, Bowen and Wilhoit (R. 60). It was Neely's duty to record the measurements when made by the others (R. 57). To make the measurements, it was necessary that the four men be on top of the counterweights (R. 33). Each of them stepped, or jumped, from the platform to the counter-

weight in Quadrant III and completed the measurements there (R. 57). Wilhoit testified that he then proceeded from that counterweight to the platform, walked across the platform, stepped on the steel crib through the opening left in the railing there, walked along the steel crib, and then jumped over onto the top of the Quadrant II counterweight (R. 58). Upon arriving at the Quadrant II counterweight, he turned for a moment to see if Neely and the others were coming over, at which time he observed Neely coming across the platform. He then turned his attention to his own work, and upon glancing up a second time saw Neely falling head first by the counterweight (R. 58). He was unable to catch Neely and thus halt him from falling to his death (R. 58). Wilhoit admitted that the railing did not break (R. 68), that the platform did not break (R. 68) and that there was no grease in the area (R. 69). Neither of the other two men who were present were called to testify. There was no other veidence as to the cause of the accident.

VI. SUMMARY OF ARGUMENT

A. By virtue of the Judicial Code of 1948, the Court of Appeals has clear and unquestioned power to reverse a case lawfully brought before it for review, and to remand said case to the court from whence it came with instructions to dismiss the same. This statutory power of the Court of Appeals is clearly recognized in the Federal Rules of Civil Procedure and by the decisions of this Court. 62 Stat. 963, 28 U.S.C. 2106; Rule 50, Federal Rules of Civil Procedure; *Cone v. West Virginia Pulp & Paper* Co., 330 US 212; *Globe Liquor Co. v. San Roman*, 332 US 571; *Montgomery Ward & Co. v. Duncan*, 311 US 243;

Johnson v. New York, New Haven & Hartford Railroad Company, 344 US 48.

B. After respondent's motion for judgment n.o.v. was denied by the trial court, and after respondent filed its appeal in the Court of Appeals, petitioner as appellee in the Court of Appeals had ample opportunity under Rule 50(d) Federal Rules of Civil Procedure to assert in that court any grounds she may have had for a new trial should that court reverse the case. Failing to assert such rights in the Court of Appeals, petitioner cannot now claim that the judgment of the Court of Appeals deprived her of the right to request a new trial. Neither *Cone v. West Virgina Pulp & Paper Co.*, 330 US 212, nor *Globe Liquor Co. v. San Roman*, 332 US 571, nor *Weade v. Dichman, Wright & Pugh*, 337 US 801, so hold. Rule 50, Federal Rules of Civil Procedure.

C. Since the trial court denied rather than granted respondent's motion for judgment n.o.v., the provisions of Rule 50 (c) (2) have no application here. Instead, if petitioner desired to assert grounds for new trial, it was encumbent on her to do so as appellee in the Court of Appeals. Failing to do so, she has no further right to request a new trial. Rule 50, Federal Rules of Civil Procedure; *Notes of Advisory Committee on Rules*, 28 U.S.C.A. Rules 34 to 51 (1965 Pocket Part) Page 184-185.

D. Neither the Seventh Amendment to the Constitution of the United States, nor Rule 38(a) Federal Rules of Civil Procedure prevent the Court of Appeals from reversing (for legal insufficiency of the evidence) a judgment based upon a jury verdict in the trial court and remanding the same to the trial court with instructions to dismiss the action. This Court has so held both before

and after the adoption of Rule 50 of the Federal Rules of Civil Procedure, and the rule itself clearly recognizes this power. Rule 50(b) Federal Rules of Civil Procedure; *Baltimore & C. Line v. Redman*, 295 US 654; *Montgomery Ward & Company v. Duncan*, 311 US 243.

E. The Petition for Writ of Certiorari did not challenge the rulings of the Court of Appeals on the merits of the case, and we submit those matters are not properly before the Court at this time; however, petitioner devotes much argument to those matters in her brief, and we reply. Since petitioner failed to establish what caused Neely to fall or that respondent was negligent with respect to the fall, there was nothing, under Colorado law, for the jury to determine, from the undisputed evidence, save by speculation. The proximate cause of the accident was not established. The Court of Appeals viewed the evidence in the light most favorable to petitioner, correctly held under Colorado law that the motion for directed verdict should have been granted for insufficiency of evidence and properly reversed the case. *Gordon v. Clotsworthy*, 127 Colo. 377, 257 P.(2d) 410; *Mosko v. Walton*, 144 Colo. 602, 358 P.(2d) 49.

VII. ARGUMENT

A. WHETHER THE COURT OF APPEALS HAS THE POWER TO REVERSE FOR INSUFFICIENCY OF EVIDENCE AND REMAND TO THE DISTRICT COURT FOR DISMISSAL A TORT ACTION IN WHICH THE PLAINTIFF OBTAINED A JUDGMENT BASED UPON A JURY VERDICT, THE PROVISIONS OF RULE 50 FEDERAL RULES OF CIVIL PROCEDURE TO THE CONTRARY NOTWITHSTANDING?

Pertinent portions of the Judicial Code of 1948 (62 Stat. 963, 28 U.S.C. 2106) provide as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

The Court of Appeals is unquestionably a court of appellate jurisdiction and by virtue of the Statute just set out clearly has the power to reverse judgments properly brought before it, to remand such judgments to the trial court, and to direct the trial court to enter other judgments. If an appellate court did not have this power, it would not be an appellate court. The Statutory power of the Court of Appeals just set out is not limited to cases tried to the Court sitting without a jury, but clearly applies to all judgments entered by lower courts, whether based upon jury verdicts or not. Nothing in the above-mentioned statute in any way limits the appellate powers of the Court of Appeals to any particular type of case, and the statute specifically refers not only to reversal but also to the direction for entry of such appropriate judgment, decree or order as may be just under the circumstances. This power is also re-affirmed in Rule 50(c) and Rule 50(d) Federal Rules of Civil Procedure.

It is significant to note that the statute just mentioned was passed after this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 US 212; and *Globe Liquor v. San Roman*, 332 US 571, to which cases extended

reference will be made in Part II of this brief. This fact strengthens those decisions if they left any doubt as to the power of the Court of Appeals to remand for dismissal in a proper case.

Finally, in *Montgomery Ward & Co. v. Duncan*, 311 US 243, decided in 1940, this Court clearly held that the Court of Appeals had the power under Rule 50(b) to reverse a trial court judgment and order that court to enter a judgment n.o.v. Concerning the proper and justified procedure under Rule 50(b), this Court stated as follows:

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment n.o.v. and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment n.o.v. and errors of law in the trial as heretofore. *The appellate court may reverse the former action and itself enter judgment n.o.v. or it may reverse and remand for a new trial for errors of law . . . .*" *Montgomery Ward & Co. v. Duncan*, 311 US 243, 253-254. (Emphasis added)

This language was recently cited with approval by this Court in *Johnson v. New York, New Haven & Hartford Railroad Company*, 344 US 48, 56-57, where as in *Cone* and *Globe*, defendant's failure in the trial court to specifically move for judgment n.o.v. deprived the Court of Appeals to direct the entry of such judgment on appeal.

There appears no question but that if the provisions of Rule 50 are followed—which they most certainly were here—the Court of Appeals has the power, both under said Rule 50 and under the aforementioned statute, to direct the entry of a judgment of dismissal in the trial court.

B. WHETHER THE COURT OF APPEALS, AFTER DECIDING THAT RESPONDENT SHOULD HAVE BEEN GRANTED A JUDGMENT N.O.V., HAD POWER UNDER RULE 50 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S DECISIONS IN CONE V. WEST VIRGINIA PULP & PAPER CO., 330 U.S. 212; GLOBE LIQUOR CO. V. SAN ROMAN, 332 U.S. 571; AND WEADE V. DICHMANN, WRIGHT & PUGH, 337 U.S. 801, TO ORDER THE CASE DISMISSED AND THEREBY DEPRIVE PETITIONER OF ANY OPPORTUNITY TO INVOKE THE TRIAL COURT'S DISCRETION ON THE ISSUE OF WHETHER PETITIONER SHOULD HAVE A NEW TRIAL?

We respectfully submit that the Court of Appeals had such power, and further that the manner in which the power was exercised in no way deprived petitioner of any opportunity to request a new trial.

Determination of this question requires a careful study of Rule 50, Federal Rules of Civil Procedure, in particular Paragraphs (c) and (d) thereof.

Paragraph (a) of Rule 50 entitles a party to move in the trial court for a directed verdict at the close of the evidence offered by an opponent without waiving his right to trial by jury and without waiving his right to put on evidence should the motion be denied. Respondent

here invoked the provisions of this paragraph in the trial court, and after its motion for directed verdict was denied (R. 73) put on evidence, following which the matter was submitted to the jury which then returned a verdict in favor of petitioner and against respondent (R. 87). We respectfully submit that Paragraph (a) of Rule 50 is not involved in this proceeding.

Paragraph (b) of Rule 50 provides that when a motion for directed verdict is not granted, the case is deemed submitted to the jury subject to a later determination of the legal sufficiency of the motion, provided that the losing party file his motion for judgment n.o.v. within ten days after judgment. Such a motion can, the Rule provides, be joined with a motion for new trial. The trial court can then (1) allow the judgment to stand (2) reopen the judgment and order a new trial or (3) reopen the judgment and direct the entry of judgment as if the requested directed verdict had been granted. Respondent here invoked the provisions of this paragraph, and within ten days after entry of judgment filed its combined Motion for Judgment Notwithstanding the Verdict or for New Trial (R. 6-8). Petitioner filed no motions attacking the judgment. The motion just mentioned was denied by the trial court (R. 8). As was the case with Paragraph (a), we respectfully submit, Paragraph (b) of Rule 50 is not involved in this proceeding.

Paragraph (c) of Rule 50 sets forth the procedures to be followed by court and counsel should the motion for judgment n.o.v. be *granted* by the trial court. We have emphasized the word *granted*, since the following Paragraph (d) refers to procedures to be followed by court and counsel should the motion for judgment n.o.v. be

denied. If the motion is *granted,* the trial court must also rule on the motion for new trial, if any, and make specific orders as to whether the same should be granted should the granting of the motion for judgment n.o.v. be vacated or reversed by a higher court. If the motion is *granted,* then the party whose verdict has been thus set aside may himself file a motion for new trial within 10 days after entry of the judgment n.o.v. We respectfully submit that Paragraph (c) of Rule 50 is not involved in this proceeding since respondent's motion for judgment n.o.v. was not granted, but rather denied. Thus it was not encumbent upon petitioner to make any motion for new trial herself in the trial court; nor is any provision contained in Paragraph (c) for the filing of such a motion. By the same token, it cannot be said that petitioner has been denied a right to seek a new trial under Rule 50 (c) (2) since petitioner clearly had no such right under said rule in the first place. We shall return to this particular phase of the matter in a subsequent paragraph.

Paragraph (d) of Rule 50 sets forth the procedures to be followed by court and counsel when the motion for judgment n.o.v. is *denied.* That, of course, is the situation here. When the motion is *denied* by the trial court, then the party who prevailed on the motion (in this case the petitioner) can—as appellee in the Court of Appeals—asert grounds *in that court* entitling him to a new trial in the trial court should the Court of Appeals reverse the ruling on the judgment n.o.v. Paragraph (d) further provides that nothing in the rule shall preclude the Court of Appeals from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Of considerable significance, we submit, is the fact

that Rule 50(d) is only permissive insofar as the powers of the Court of Appeals are concerned. The rule does not limit the powers of that Court in any respect; rather the rule merely provides that in case the Court of Appeals reverses the judgment below, it may if it so desires rule on whether the appellee is entitled to a new trial, and if so on what terms. The rule does not require that the Court of Appeals grant a new trial; nor does it require that the granting of a new trial be left up to the trial court. Petitioner's argument that Rule 50(d) prescribes what the Court of Appeals must do is refuted by the very words of the Rule itself. The powers of the Court of Appeals are set forth in the *Judicial Code of* 1948—62 Stat. 963, 28 U.S.C. 2106—any they are in no way limited or restricted by Rule 50(d).

As appears from the record in this case, respondent filed its motion for judgment n.o.v. (R. 6-8), the motion was denied by the trial court (R. 8), the denial asserted as error in the Court of Appeals (R. 1-2), and the Court of Appeals reversed the case and remanded the same to the trial court for dismissal (R. 95). It is, therefore, Paragraph (d) of Rule 50 which controls the outcome of the case here.

Of extreme significance is the fact that at no time in the Court of Appeals did petitioner avail herself of the provisions of Rule 50(d) and assert grounds entitling her to a new trial in the event that the Court of Appeals concluded that the trial court erred in denying the motion for judgment n.o.v. In fact, the only relief requested by petitioner in the Court of Appeals was that set forth in the last sentence of the Conclusion of her brief in the Court of Appeals, which is as follows:

> "... There being no reversible error present, the appellee prays that the judgment be affirmed and that there be granted to the appellee such other and further relief as to the court may seem appropriate." (Page 16 of Brief of Appellee)

Unquestionably, petitioner asked but for one thing in the Court of Appeals—affirmance of the trial court judgment. She makes the same request here. She neither requested a new trial should the Court of Appeals reverse, nor did she assert any grounds as to why she should be entitled to a new trial should the Court of Appeals reverse. Now for the first time petitioner asserts that she has been deprived of her right under Rule 50 to seek a new trial—a right which did not exist under Rule 50(c) because the motion for judgment n.o.v. was denied by the trial court, and a right which she failed to exercise under Rule 50(d) by making no request for a possible new trial in the Court of Appeals should the case be reversed. The fact of the matter is that petitioner was not *deprived* of her rights under Rule 50—*she simply failed to exercise those rights!*

Neither *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212; nor *Globe Liquor Co. v. San Roman*, 332 U.S. 571; nor *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801 hold that petitioner has been deprived of any rights under Rule 50.

In *Cone*, the petitioner here was plaintiff in the trial court and the respondent was defendant. At the close of all the evidence, respondent moved for directed verdict on the ground that petitioner had failed to prove his case. The motion was denied. The jury returned a $15,000.00 verdict, upon which the trial court entered judgment.

Respondent moved for a new trial on the ground of newly discovered evidence, *but did not move for judgment n.o.v.* On appeal the Court of Appeals ruled that admission of certain evidence by the trial court was error, and that without said evidence there was an insufficiency of proof. The Court of Appeals then reversed the case and directed the trial court to enter judgment for respondent. The holding in *Cone* was that in the absence of a motion for judgment n.o.v. in the trial court, the Court of Appeals was without power to order the trial court to dismiss. This Court's specific language in that connection was:

> "In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion. The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. *In the absence of such a motion,* we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217-218. (Emphasis added).

It should be noted that *Cone* was decided in 1946, long prior to the 1963 amendments to Rule 50 which among other things added Paragraphs (c) and (d).

Applying the language of *Cone* to the instant situation (and keeping in mind that Rule 50 is different now than it was then) it seems logical to assume that if a motion for judgment n.o.v. had been filed in that case, the Court of Appeals would have had the power to reverse and dismiss. If anything, therefore, *Cone* supports respondents here and does not require the result sought by petitioner. *Cone* also suggests that if a motion for judgment n.o.v. had been filed in that case, the petitioner (plaintiff below) might have considered dismissal under Rule 41 in order to re-try the case and to supply the crucial gap in his evidence. Petitioner here made no attempt to invoke Rule 41, even in the presence of respondent's motion for judgment n.o.v., so *Cone* is of no help to her in that respect here.

In *Globe Liquor Co. v. San Roman*, 332 U.S. 571, the petitioner here was plaintiff in the trial court and respondent was defendant. The action was for breach of warranty. At the close of all the evidence both parties in the trial court moved for directed verdict. Petitioner's motion was granted and the jury instructed to return a verdict for petitioner. Respondent moved for new trial, but not for judgment n.o.v. This motion was denied. On appeal, the Court of Appeals set aside the judgment and ordered the trial court to enter judgment for respondent. This Court granted certiorari to determine whether the action of the Court of Appeals was inconsistent with *Cone*. This Court held that since respondent made no motion for judgment n.o.v. in the trial court, the Court of Appeals erred directing the trial court to enter the judgment for respondent. It was argued there that *Cone* did not apply since in that case the trial court jury returned its own verdict, where as in *Globe* the trial court jury was directed

to return a verdict. This Court held that this distinction did not require a different result.

Again, as in *Cone,* this Court did not say the Court of Appeals had no power generally to direct the entry of judgment below; merely, that since respondent made no motion for judgment n.o.v. in the trial court, the Court of Appeals was powerless to itself direct the entry of such a judgment. The clear inference is, we respectfully submit, that if respondent in *Globe* had filed a motion for judgment n.o.v. in the trial court, the Court of Appeals would then have the power to direct the entry of judgment. Also, it should be noted that *Globe* was decided before the 1963 amendments to Rule 50 FRCP.

It is significant to point out that in *Globe* (as in the instant case) the petitioner asked this Court to reinstate the original judgment in the trial court. This Court refused, stating:

> "Whether a verdict should have been directed, however, depends upon a number of factors, including an interpretation of the law of Illinois where the contract was made, a proper interpretation of the pleadings, a determination whether the disputed deposition was admitted in evidence in whole or in part and the effect of that evidence if admitted. Under these circumstances, the judgment of the Circuit Court of Appeals in reversing and remanding the cause to the District Court is affirmed." *Globe Liquor v. San Roman,* 332 U.S. 571, 574.

For the same reasons the rulings of the Court of Appeals here with regard to the legal sufficiency or insufficiency of the evidence should stand.

In *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, petitioner here was the plaintiff in the trial court, and respondent was defendant. Petitioner's claim was that respondent—a general agent for a common carrier—was liable as a common carrier for the acts of a carrier not a party to the action. The jury was so instructed, and returned a verdict for petitioner. Respondent filed a motion for judgment n.o.v. which was denied. On appeal, the Court of Appeals ordered the trial court to enter judgment for respondent on the ground that there was no evidence by which the theory of petitioner's case had been established; to-wit, that respondent was not a common carrier. This Court upheld the holding of the Court of Appeals regarding legal sufficiency of the evidence, but ordered that the direction to enter judgment be eliminated, stating:

> "As there were suggestions in the complaint and evidence of alleged liability of respondent to petitioner for respondent's own negligence while acting as general agent, this direction should not have been given." *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, 809.

No where in *Weade* is any mention made of the power of the Court of Appeals to reverse and remand for dismissal—merely that since in that case it appeared from the pleadings and the evidence that even if the Court of Appeals was correct in ruling that respondent was not a common carrier, there was nevertheless the possibility that petitioner might establish independent acts of negligence on the part of respondent; hence the case should not have been dismissed by the Court of Appeals. Concerning this point, it is of utmost significance that petitioner here makes no claim or showing or contention that there exist in the pleadings or evidence any grounds

for liability other than those upon which the case was tried in the trial court or reviewed by the Court of Appeals. On the contrary, petitioner here still seeks only affirmance of the trial court judgment, and nothing else.

Concerning *Cone, Globe* and *Weade,* petitioner in her brief states only that those cases establish that she has been deprived of her right to seek a new trial. Such an unsuppported statement has basis neither in the cases themselves nor in the provisions of Rule 50 (as amended) and as it existed at the time this case was tried. In none of the cases is any statement made that under no circumstances can the Court of Appeals remand a case for dismissal. The thrust of *Cone* and *Globe* is, we respectfully submit, that before a party can obtain judgment of dismissal from the Court of Appeals, he must first request the trial court for such a judgment below. This is sound, because the trial court saw and heard the witnesses. *Weade* says that the Court of Appeals has power to reverse for legal insufficiency of evidence—and even affirms the Court of Appeals in that connection—and in effect makes no ruling at all concerning the effect of Rule 50. Petitioner has, we respectfully submit, utterly failed to connect the three cited cases to the instant case; in fact, as we have pointed out before, petitioner does not appear serious about a new trial at all, but talks only about affirmance of the trial court judgment. Neither *Cone* nor *Globe* nor *Weade* support petitioner in this. Finally, petitioner says absolutely nothing about her admitted failure to assert grounds for new trial in her Court of Appeals brief. She asserted no grounds there and she asserts no grounds here except to state (Page 13 of her brief) that she should have a new trial because of "errors committed by the trial court and heretofore not enumerated."

If petitioner is correct that she is entitled to a new trial under the circumstances of this case, then these matters would never end, since the function of the Court of Appeals would be limited either to affirmance or to the granting of a new trial—a rather limited function for an appellate court, we submit. In effect, a plaintiff could keep trying and re-trying his case until he finally achieved affirmance from the Court of Appeals—and the opposing party would have almost no rights at all.

To conclude this portion of the brief, we respectfully submit that since petitioner did not assert grounds in the Court of Appeals for new trial—which she had a perfect right to assert in accordance with Rule 50(d)—she has no basis for contending in this Court that her rights to seek a new trial have been taken from her. *Cone, Globe* and *Weade* do not sustain petitioner in this regard (1) since they are distinguishable on their facts and (2) because they were decided before the 1963 amendment to Rule 50.

C. WHETHER THE COURT OF APPEALS ERRED IN ORDERING THE DISTRICT COURT NOT MERELY TO ENTER JUDGMENT N.O.V. FOR RESPONDENT BUT TO DISMISS PLAINTIFF'S CASE IN VIEW OF RULE 50 (c) (2) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHICH GIVES A PARTY WHOSE VERDICT HAS BEEN SET ASIDE THE RIGHT TO MAKE A MOTION FOR NEW TRIAL NOT LATER THAN 10 DAYS AFTER ENTRY OF THE JUDGMENT NOTWITHSTANDING THE VERDICT?

What we have said in Part II above does, we believe, establish that since Rule 50 (c) (2) applies only to situa-

tions where the trial court grants a motion for judgment n.o.v. after a jury trial, and is therefore inapplicable here where the motion for judgment n.o.v. was denied.

Although Rule 50 as amended refers occasionally to appellate procedures, its real purpose is, we respectfully submit, to permit the trial judge who saw the witnesses and heard the testimony an opportunity to reconsider the case upon its completion and remedy any errors which may then be found to exist. Although a trial court undoubtedly has power on its own motion to remedy errors committed during the trial, it seems clear that before Rule 50 can be applied, a motion for directed verdict must first be made during the trial itself and either a motion for new trial and/or a motion for judgment n.o.v. be made within 10 days following the trial. In other words, before a party can seek the protection of Rule 50 he must first file certain motions both during and after the trial. In the absence of any such motions, certainly, a party has no right to complain that he was not afforded the relief to which the Rule might have entitled him.

We have already pointed out that insofar as Rule 50(a) is concerned, respondent did move for a directed verdict at the proper time and in the proper manner; that insofar is Rule 50(b) is concerned, respondent did move for judgment n.o.v. at the proper time and in the proper manner; and that both motions were denied. We have already pointed out that since the motion for judgment n.o.v. was denied, the provisions of Rule 50(c) do not apply; and that there was certainly no reason at that point and under that part of the rule for petitioner to then file a motion for new trial, since petitioner was simply not a "party whose verdict has been set aside on

motion for judgment notwithstanding the verdict" as Rule 50(c)(2) provides. Furthermore, even if the motion for judgment n.o.v. had been granted in this case and even though petitioner had not moved for a new trial under Rule 50(c)(2), she would have been entitled on her appeal from the judgment n.o.v. not only to urge that the judgment be reversed and judgment entered on the verdict; but also that errors were committed during the trial which at the least entitled her to a new trial. This latter possibility is discussed in the *Notes of Advisory Committee on Rules*, 28 U.S.C.A. Rules 34 to 51 (1965 Pocket Part) Pg. 184-185.

In the absence of Rule 50(d) it might possibly be argued that the reversal by the Court of Appeals with instructions to dismiss might amount to the setting aside of a verdict "on motion for judgment notwithstanding the verdict" and that the loser on appeal be given an opportunity to ask for new trial under Rule 50(c)(2) after remand to the trial court. However, since Rule 50(d) specifically covers this point and provides the right to urge new trial in the Court of Appeals, Rule 50(c)(2) simply does not apply.

We have already established that Rule 50(d) clearly and unequivocally gave petitioner in this case an opportunity to present in the Court of Appeals grounds entitling her to a new trial should that court reverse the case. Certainly by exercising this right, petitioner could still have urged that the judgment be upheld. A statement to this effect appears in *Notes of the Advisory Committee* just referred to. But petitioner made no such request in the Court of Appeals, and in so doing has, we submit,

waived her right to make any further request for new trial at this point.

When Rule 50(c) is read in conjunction with Rule 50(d), the conclusion just reached seems inescapable. If motion for judgment n.o.v. is granted then the other party has a right to move for a new trial in the trial court. If motion for judgment n.o.v. is denied, then the other party has the right to move for a new trial in the Court of Appeals. No provision is made for moving for a new trial in both courts under the same circumstances. Logic and expediency also justify this conclusion. In the first instance, the appellate court will have had the benefit of the trial court's thoughts on the necessity of a new trial. In the second instance the appellate court will have the benefit of appellee's thoughts concerning new trial at the time it considers the entire case, and if it concludes that a new trial is not justified can end the controversy once and for all. In neither instance is the Court of Appeals prevented from ordering a new trial since Rule 50(d) specifically grants this power to said court.

In her brief, petitioner for all practical purposes ignores this point, stating only that had the trial court granted the motion for judgment n.o.v. she could have sought a new trial. Petitioner says absolutely nothing about her failure as appellee in the Court of Appeals to urge new trial in the event of reversal. The fact of the matter is that petitioner asked only for affirmance in the Court of Appeals, and for all practical purposes seeks only affirmance here as is clearly evident from her conclusion at Page 15 of her brief.

To conclude this portion of the brief, we respectfully

submit that since the trial court denied rather than granted respondent's motion for judgment n.o.v., the provisions of Rule 50(c)(2) do not apply, and that it was clearly incumbent upon petitioner to assert grounds for new trial as appellee in the Court of Appeals. Having failed to make such request there she is in no position to claim the right to make further request for new trial.

D. WHETHER RULE 38(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PRECLUDE THE COURT OF APPEALS FROM INSTRUCTING THE TRIAL COURT TO DISMISS AN ACTION WHEREIN THE PLAINTIFF OBTAINED A JURY VERDICT IN THE DISTRICT COURT AND THE DISTRICT COURT THEREAFTER DENIED DEFENDANT'S MOTION FOR NEW TRIAL AND DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ENTERED JUDGMENT FOR PLAINTIFF?

Petitioner argues that since she obtained a jury verdict in the trial court, the order of the Court of Appeals directing the trial court to dismiss the action violated the Seventh Amendment and Rule 38(a) of the Federal Rules of Civil Procedure. At least since the adoption of Rule 50 of the Federal Rules of Civil Procedure in 1938 this is not the law in the Federal courts.

Prior to 1913, the Federal courts appellate recognized and granted judgments n.o.v. usually subject to whatever restrictions were imposed on the granting of such judgments by the state in which the Federal trial court sat. However, in 1913 this Court held in *Slocum v.*

New York L. Ins. Co., 228 US 364, that a direction by the Court of Appeals to the trial court to enter judgment for the defendant notwithstanding a verdict for plaintiff, for the reason that there was insufficient evidence to support the verdict, was an infraction of the Seventh Amendment, notwithstanding that the trial court erred in refusing to direct a verdict for the defendant as requested. The case was remanded by this court for new trial in the District Court.

Slocum did not, however, affect the rule at common law that a judgment n.o.v. could be granted where plaintiff's pleadings, even if true, disclosed no right of recovery. See *Annotation* in 85 *L.ed* 155, 156-158.

Two devices were thereafter invoked to avoid the effect of the rule in *Slocum*, both of which were approved by this Court. The more commonly used of these devices was the common-law method of reserving decision on a question of law until after the jury had rendered its verdict; that is, where a motion for directed verdict, dismissal, or the like was made at the close of the evidence. This latter device was approved by this Court in *Baltimore & C. Line v. Redman*, 295 US 654, where a decision of Court of Appeals reversing a District Court judgment and remanding the case to the trial court for a new trial for insufficiency of the evidence, was modified by this Court by directing an order of dismissal rather than a new trial in the District Court. In that case, the trial court reserved its decision on defendant's motion for directed verdict at the close of the evidence and submitted the case to the jury subject to the question reserved and thereafter received a jury verdict for plaintiff. Later the trial court ruled the motion for directed verdict ill-grounded and entered judg-

ment for plaintiff on the verdict. Defendant appealed with the aforementioned result. Concerning the relationship of this device to the Seventh Amendment, this Court stated as follows:

> "At common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments. Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment. This Court has distinctly recognized that a Federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant. (Chino-

weth v. Haskell, 1830, 3 Pet US 92 7 L.ed 614).''
Baltimore and C. Line v. Redman, 295 US 654, 659-661.

Subsequent to *Redman, Rule* 50(b) Federal Rules of Civil Procedure was adopted. This rule, we submit, approved the procedure laid down in *Redman* and in addition rendered automatic the reservation by the trial court of its decision on a motion for directed verdict. Concerning the purpose of Rule 50(b) this Court made the following statement in *Montgomery Ward & Company v. Duncan,* 311 US 243, 250:

> ''The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict. The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution.''

Although this Court has not to our knowledge, specifically ruled as to whether Rule 50(b) is in violation of the Seventh Amendment, it would appear from the language of the cases cited above that since the result achieved by Rule 50(b) was incident to jury trials prior to the adoption of the Seventh Amendment, the rule does not deny parties litigant any constitutional rights. We also point out that the constitutionality of Rule 50(b) was upheld in *Brunet v. S. S. Kresge* (CCA 7th) 115 F.(2d) 713 on facts similar to those involved in *Slocum.*

What we have said above renders completely inapplicable the case of *Crim v. Handley,* 94 US 652 cited by petitioner in her brief. That case was decided in 1877, long before *Redman,* and long before the adoption of Rule 50(b) of the Federal Rules of Civil Procedure. Furthermore, in *Grim* nothing is said about any reservation of decision by the trial court and we assume no such reservation was made. The same holds true for *Metropolitan R. Co. v. Moore,* 121 US 558, decided in 1886, and for *Fairmount Glass Works v. Coal Co.,* 287 US 474 decided in 1932, both of which are cited in petitioner's brief. In neither of the latter cases was the point here under consideration even an issue under consideration. As for *Tennant v. Peoria & P.U. Ry. Co.,* 321 US 29, suffice it to say that it has nothing whatsoever to do with the right to trial by jury, nor does it in any way question the power of a trial court to grant a directed verdict or the power of an appellate court to reverse for insufficiency of evidence. The case holds that where the evidence is sufficient to sustain the verdict of the jury, it is improper for an appellate court to re-weigh the evidence and substitute its own conclusions for those of the jury. In *Tennant,* the evidence was conflicting, and this Court properly held that the Court of Appeals had no right to reach its own conclusions as to what happened. Legal sufficiency or insufficiency of the evidence formed no part of the ruling of the Court of Appeals, and it is also interesting to note that in *Tennant,* the following statement *is* made about legal insufficiency of evidence:

> "Petitioner was required to present probative facts from which negligence and causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for proba-

tive facts . . . ." *Tennant v. Peoria & P.U. Ry. Co.*, 321 US 29, 32-33.

To conclude this portion of our brief, we respectfully submit that the actions of the Court of Appeals—as well as the actions of the trial court—were in conformance with Rule 50 and were not in violation of the Seventh Amendment to the Constitution of the United States.

E. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFF FAILED TO ESTABLISH EITHER THE NEGLIGENCE OF THE DEFENDANT OR THE PROXIMATE CAUSE OF THE ACCIDENT WHICH RESULTED IN THE DEATH OF PLAINTIFF'S DECEDENT?

This question was neither presented nor argued in petitioner's Petition for Writ of Certiorari hereinbefore filed. On the contrary, the only question presented in said Petition was whether Rules 50(d) and 38(a) Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States precluded the Court of Appeals from remanding the case to the District Court with instructions to dismiss (Page 2 of the Petition). Nothing therein challenged the rulings of the Court of Appeals with regard to the legal insufficiency of petitioner's evidence in the trial court. The only argument advanced by petitioner in said Petition was that the Court of Appeals was without power to remand the case for dismissal by the District Court.

Now that certiorari has been granted, petitioner argues for the first time in this Court that the Court of Appeals incorrectly ruled on the legal insufficiency of

the evidence. In fact, we believe it a fair statement that viewed as a whole, petitioner's brief on the merits concerns itself not with the power of the Court of Appeals but rather that the Court of Appeals incorrectly held that petitioner's evidence in the trial court was legally insufficient to establish either negligence or proximate cause. We do not perceive this issue to be properly before this Court, but since petitioner has devoted almost her entire brief to this subject, we cannot allow her statements thereon to go unanswered.

At the outset, it should be kept in mind that the Court of Appeals did not, as petitioner suggests, invade the province of the jury; nor did the Court of Appeals search the record for evidence which would take the case away from the jury. What the Court of Appeals did do —and this is clear from its entire opinion (R. 88-94) and in particular from its conclusion (R. 94)—was to hold that the record before it wholly failed to disclose sufficient evidence to establish either negligence or proximate cause. This the Circuit Court did from undisputed facts viewed in the light most favorable to the petitioner. The language used by the Court of Appeals clearly illustrates the basis upon which the case was reversed:

> "*Viewing the evidence in the light most favorable to the plaintiff,* it establishes only that on the day in question Eby's employees were directed to modify a platform or scaffolding so that it would not interfere with certain critical measurements that had to be made within the silo; and that Eby's employees made the necessary changes . . . *There is no evidence of the cause of Neely's fall.* The uncontradicted evidence does show that the platform did not break, that the

railing did not break, and that there were no grease spots on the platform upon which he might have slipped. *In short, the most that the evidence establishes is that Neely was on a platform constructed by Eby's employees at the time he fell.* (R. 92) (Emphasis added)

• • •

"We conclude that the record wholly fails to disclose sufficient evidence to establish either negligence on Eby's part or, assuming such negligence, that it was the proximate cause of Neely's death." (R. 94)

The power of the Court of Appeals to reverse a District Court judgment for legal insufficiency of evidence is not challenged here; nor would there be any basis for such a challenge under the cases cited previously in this brief. We are not, therefore, dealing with whether the Court of Appeals had the power to reverse, but whether the evidence adduced in the trial court was sufficient as a matter of law to sustain the verdict of the jury. The record clearly establishes that the evidence was not sufficient.

As plaintiff in the trial court, petitioner had the burden of proving (1) that respondent was negligent with regard to the platform and (2) that this negligence proximately caused the death of Neely. Petitioner proved neither. She failed to establish anything more than that respondent constructed and/or modified a platform as requested by the day silo captain (R. 15-16), that Neely was seen on or getting onto the platform a few moments before his death (R. 58-59) and that shortly thereafter was seen falling through the air to his death. If this be a prima facie case of negligence and causation, then the mere happening of an accident would automatically raise

a presumption of negligence. Such is not the law in Colorado. *Drake v. Lerner Shops of Colorado, Inc.*, et al., 145 Colo. 1, 357 P.(2d) 624.

Petitioner did not offer any evidence whatsoever as to how or why Neely fell, but she takes the position that merely because Neely was last seen alive on the platform, the platform must have had something to do with his fall. The uncontradicted evidence was that the platform did not break, that the railing did not break, and that there were no grease spots on the platform. The pictures to which petitioner refers in her brief (Exhibits 1, 2, 3, 5 and 10) were before the Court of Appeals when it considered the case on appeal, and they clearly establish that the platform did not fail. There is no evidence that the presence or absence of the railing had anything to do with the accident; in fact it would seem logical that if anything the railing would have prevented rather than caused Neely to fall. There is no evidence that Neely tripped or stumbled or slipped due to any improper construction or maintenance of the platform; this despite the fact that two other millwrights beside Wilhoit and Neely were present at the time of the accident but were not called to testify. There is no evidence that the size of the platform caused Neely to fall. Neely stated just before his death that everything was under control when asked how things were going at which time he was physically standing on the platform. In short, the most that the evidence established was that Neely was on the platform at the time he fell. There is no evidence of the cause of Neely's fall.

Only by conjecture, speculation or surmise could the jury have found either negligence or causation in this case. One cannot sustain the burden of proof as to either negli-

gence or causation in Colorado upon such evidence, as appears from the following statement from *Gordon v. Clotsworthy*, 127 Colo. 377, 257 P.(2d) 410, 411:

> " . . . To be liable, the defendant in this case must be shown to have been negligent in some act or omission which proximately caused plaintiff's injury. The burden of proof of negligence rests upon the party who asserts it, and such burden cannot rest on surmise, speculation or conjecture, but must be grounded on substantial evidence. *Coakley v. Hayes*, 121 Colo. 303, 306, 215 P.(2d) 901"

To the same effect see *Letts v. Iwig*, 153 Colo. 20, 384 P.(2d) 726, and *Perry Lumber Co. v. Ruybal*, 133 Colo. 502, 297 P.(2d) 531.

The following statement by this Court in *Moore v. Chesapeake and Ohio Railway Co.*, 340 US 573, 577-78, is signifcant in this regard:

> "To sustain petitioner, one would have to infer from no evidence at all that the train stopped, where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. Galloway v. United States, 319 US 372, 87 L.ed 1458, 63 S. Ct. 1077."

But even assuming for the purpose of argument and nothing more that the jury could have, by inference, found some sort of negligence on the part of respondent with regard to the construction of the platform—condition of the

floor, railing unnecessary, platform too small—it by no means follows that petitioner would be entitled to recover, since, under Colorado law, proof of negligence alone is insufficient to impose liability. Colorado law requires that *proximate cause* as well as negligence must be established. The record is absolutely devoid of evidence as to the proximate cause of Neely's fall. This was clearly recognized by the Court of Appeals in its opinion, wherein this statement was made (R. 94):

> " . . . In this case, the *undisputed facts* show a *total lack of competent evidence* to connect the fall by Neely with the alleged negligence on Eby's part. There is no adequate showing of a causal connection between the alleged smallness of the platform or the location of the railing or the lack of additional railings and Neely's fall. It may, of course be conceded that the platform might possibly have had something to do with his fall, but there is nothing in the record to show what it was." (Emphasis added)

That proximate cause as well as negligence must be established in Colorado appears in *Mosko v. Walton*, 144 Colo. 602, 358 P.(2d) 49. There the plaintiffs contended that their building was damaged by defendant's negligence in the continued use of a leaking water pipe. Plaintiffs were awarded $20,000.00 in the trial court and the Supreme Court reversed. The only question discussed by the Colorado Supreme Court in its opinion was whether the negligence of the defendants was a proximate cause of plaintiffs' damages. The court held that proximate cause had not been established. In *Mosko*, the Colorado Supreme Court first observed that there was competent testimony to establish that the pipe was in fact leaking at

the times compiained of and that the defendants knew it —in other words, the Court in effect conceded evidence of negligence has been established. However, the Court held that there was a complete lack of competent evidence to connect the leak in question with the damage to plaintiffs' property. The Court's words to this effect are as follows:

> "The state of the evidence here is that the water line was negligently maintained, but that no adequate showing was made of a causal connection between such negligence and plaintiffs' damages . . . To hold them liable without a reasonable showing that their negligence contributed to the plaintiffs' loss is contrary to the law. . . . Their negligent act or omission must have been such that without it the injury would not have occurred. . . . The rule of proximate cause requires proof that but for the defendants' negligence the damage would not have occurred. . . . Where the evidence, as here, presents no more than an equal choice of probabilities, it is not substantial. . . . 'No number of mere possibilities will establish a probability . . .'" *Mosko v. Walton*, 144 Colo. 602, 358 P.(2d) 49, 52.

Other Colorado cases reaching a similar result are *Stout v. Denver Park & Amusement Co.*, 87 Colo. 294, 287 P.(2d) 650; *Town of Lyons v. Watt*, 43 Colo. 238, 95 Pac. 949; and *Hook v. Lakeside*, 142 Colo. 277, 351 P.(2d) 261.

Not only did petitioner fail to prove proximate cause in the trial court; she similarly failed to establish negligence on the part of respondent. The only directions given by Blanchard to respondent's carpenter foreman was his

statement that a piece of wood was in the way of the measurement procedures and that the platform should be modified so that the measurements could proceed (R. 16). Although petitioner makes much argument about railings, uprights, handrails and the floor of the platform, it is significant to note that Blanchard said nothing about this subject. He did admit, however, that the platform was a temporary structure which would change from time to time as the work progressed (R. 39). It must not be forgotten that the positioning of the platform was dictated by the I-beam on the crib and the water pipe on the silo wall (R. 41), and that the platform was where Blanchard wanted it to be; also that because of the nature of the work to be done, it was not possible for the platform to touch the counterweights.

In the absence of any evidence as to what caused Neely to fall, it is impossible to state what part if any the platform played in the fall; nevertheless, the trial court left for the jury to determine whether or not respondent was negligent. In Colorado the giving of an instruction not supported by the evidence is error. In that connection, see *Fisk v. Greeley Electric Light Company*, 3 Colo. App. 319, 33 Pac. 70, 71, where this statement is made:

> "The instructions should in all cases be based upon the evidence and an instruction, no matter how correct the principal which it may announce, that impliedly assumes the existence of evidence which was not given is erroneous. It is calculated to bewilder and mislead the jury *by producing the impression that in the mind of the court, some such state of facts as the instruction supposes may be inferred from the evidence given, or concealed within it.*" (Emphasis added)

The Court of Appeals clearly recognized this when it stated in its opinion that although it may be conceded that the platform might possibly have had something to do with the fall, there was nothing in the record to show what it was.

When petitioner argues in her brief here that the jury might well have concluded this, that and the other thing about the platform might possibly have had something to do with the accident, she really places the cart before the horse, so to speak. Hers was the burden to establish proximate cause, and the law will not permit her to do this with only speculation, conjecture and surmise; otherwise the mere happening of an accident would infer negligence.

Petitioner also argues that the rule of circumstantial evidence applies here, citing two Colorado cases which are clearly distinguishable on their facts. In *Jasper v. City and County of Denver,* 144 Colo. 43, 354 P.(2d) 1028, there was positive evidence of a hole in the public cross-walk in which plaintiff found herself sitting immediately after her fall. The maintenance of the hole was clearly negligent and it was right in plaintiff's path. The fact that plaintiff did not positively state that the hole caused her to fall did not prevent the jury from finding that it did. Here, we have no established defect; nor do we have any evidence that any such defect caused Neely to fall. The situation was substantially the same in *Remley v. Newton,* 147 Colo. 401, 364 P.(2d) 581, also cited in petitioner's brief. There the tether-ball pole admittedly fell to the ground, and the minor plaintiff was found lying on the ground bleeding, his head only a few inches from the pole. Here, we have no evidence of failure; nor do we have evidence

that any such failure caused Neely to fall. Ours is not a situation where there are two equally plausible conclusions as to how the accident happened. We have no evidence at all as to how the accident happened. The fact that the jury found liability does not supply the insufficiencies in petitioner's case which have already been established. Finally, it should be noted that the Court of Appeals carefully considered the rule of circumstantial evidence in this case and found it inapplicable (R.93).

Whatever physical measurements appear deductible to petitioner in her brief from Exhibits 1, 2 and 3 must be considered in the light of the admitted fact that despite the angle from which the pictures were taken, the platform—even as portrayed in the pictures—is only two feet above the counterweights on the vertical plane and not more than two feet away from the counterweights on the horizontal plane. More important however, is the fact that not one of the so-called conditions of the platform was in any way connected to the accident—except the very presence of the platform itself.

The remaining cases cited by petitioner at the top of Page 10 of her brief are for the most part FELA cases. This Court has previously stated that since these cases are based upon statutory rather than common law negligence, the power of decision is to be in the jury in all but those infrequent cases when fair-minded jurors cannot honestly differ. They do not question the power of the Court of Appeals to reverse. Ours is not an FELA case.

To conclude this portion of the brief, we respectfully submit that the conclusion of the Court of Appeals that the record failed to disclose sufficient evidence of either

negligence or proximate cause was both justified and proper, and did not as petitioner suggests constitute an improper invasion of the province of the jury.

VIII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals and the orders of the trial court in conformance therewith be affirmed.

Respectfully submitted,

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